In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-58

NICK SENAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 477 F. 2d 304. The unreported opinion of the district court is reprinted at Pet. App. 11-13.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1973, and a timely petition for rehearing was denied on June 5, 1973. The petition for a writ of certiorari was filed on July 3, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States is precluded from appealing the dismissal of a second indictment because it did not pursue an appeal from the dismissal of a differently worded first indictment concerning the same incidents.

2. Whether an indictment, alleging that a state-employed public defender, while acting under color of law, "willfully and unlawfully" exacted and took money from indigent clients and their friends and relatives by threatening inadequate legal representation unless such sums were paid, states an offense against the United States.

STATEMENT

Petitioner was charged in a five-count indictment (Pet. App. 17-21) with using his office of public defender (or pauper's attorney) to exact money from indigent clients.[1] Although paid a salary by the State of Indiana for his services as a public defender for Lake County,[2] petitioner, according to the indictment, unlawfully required indigent clients (or their friends and relatives) to pay him additional money before he would adequately represent them. The indictment charged that petitioner, while acting under color of law, deprived persons of property without due process of law in violation of 18 U.S.C. 242.

A previous indictment against petitioner concerning the same incidents had been returned by a federal grand jury nine months earlier (see Pet. 13 for pertinent portions of that indictment). The district court dismissed the earlier indictment for failure to state an offense (Pet. App. 14), and the United States did not pursue an appeal from that decision. Instead, a second and differently-worded indictment was obtained.

This indictment—which is the subject of the present case—was also dismissed by the district court for failure to state an offense (Pet. App. 11). The district court said, "[t]he fatal defect in the indictment here is that it fails to allege that defendant's 'victims' were ever under any *legal* obligation to pay the sums demanded" (Pet. App. 12-13; emphasis added).

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[1] See Pet. 4.

The court of appeals reversed (Pet. App. 1-10), holding that there was compulsion on the part of the petitioner to exact funds from the victims, and that it was irrelevant that no legal obligation to pay the sums existed (Pet. App. 7, 8). Petitioner seeks review of this ruling of the court of appeals.

ARGUMENT

Petitioner presents three reasons for granting the petition: (1) petitioner was not acting under color of law; (2) there was no deprivation of property without due process of law; and (3) the United States abandoned its right of appeal. The court of appeals considered and unanimously rejected all of these arguments. In our view, the decision below is correct, and none of the issues presented warrants plenary review by this Court.

1. Petitioner suggests (Pet. 13) that the government has somehow abandoned its right of appeal. After the first indictment was dismissed by the district court, the United States obtained a second indictment instead of pursuing an appeal from the dismissal of the first indictment. This second indictment was differently worded, and was an attempt to satisfy the district court's determination that the first indictment did not properly allege a deprivation of property without due process of law.

It is well settled that a federal grand jury can return a second indictment for the same offense where the first indictment has been dismissed or otherwise found defective, and the defendant has not been placed in jeopardy. *United States* v. *Root,* 366 F. 2d 377, 383 (C.A. 9), certiorari denied, 386 U.S. 912; *Buie* v. *United States,* 76 F. 2d 848, 849, certiorari denied, 296 U.S. 585; *United States* v. *Manetti,* 323 F. Supp. 683, 690 (D. Del.). Indeed, Congress has explicitly provided that,

in such circumstances, the statute of limitations is tolled where the limitations period would expire before a second indictment could be returned. 18 U.S.C. 3289.

The United States' right to appeal the dismissal of an indictment is set forth in 18 U.S.C. 3731, which provides, in part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

This Section thus authorizes an appeal in this case unless there is present a violation of the double jeopardy clause. But jeopardy had not attached at the time the first indictment was dismissed, since it attaches when the jury is impanelled and the trial commences. See, *e.g., United States* v. *Jorn,* 400 U.S. 470. Cf. *Illinois* v. *Somerville,* 410 U.S. 458. Here, the first indictment was dismissed on a pre-trial motion and, of course, no trial had begun. Therefore, the double jeopardy clause is not applicable and Section 3731 authorizes an appeal.[3]

2. In attacking the sufficiency of the indictment, petitioner contends (Pet. 7) that the indictment fails to state

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[3] Petitioner is in error in contending that the doctrine of *res judicata* and the cases of *Tait* v. *Western Maryland Railway Company,* 289 U.S. 620, and *United States* v. *Moser,* 266 U.S. 236, are applicable to the present case (see Pet. 15). The *Tait* and *Moser* decisions are civil cases which merely hold that questions actually litigated in a preceding case are not subject to relitigation in a subsequent civil case between the same parties.

an offense because he was not acting under "color of law." The indictment recites that petitioner committed the actions alleged while "serving as duly appointed pauper attorney of Lake County, Indiana, acting under color of the laws of the State of Indiana" (Pet. App. 17), but petitioner contends that he could not have been acting under color of law while serving in that capacity (see Pet. 10-11). The district court did not consider this question, but the court of appeals specifically rejected the argument, and held that the indictment was sufficient to state an offense and that the "Government should be given the opportunity to try to establish that [petitioner] acted 'under color of * * * law'" (Pet. App. 6).

The allegations of the indictment fully meet the test for action taken under color of law. In *United States* v. *Classic*, 313 U.S. 299, 326, a leading case on the interpretation of what is now Section 242 of Title 18 of the United States Code, this Court said:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

More recently, this Court has reviewed the history of the judicial interpretation of the color of law concept and concluded that "'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States* v. *Price*, 383 U.S. 787, 794, n. 7 (citations omitted). Thus, all that is required is "significant state involvement." See, *e.g.*, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715.

The public defender's office (or pauper attorney) was created by state statute, and the petitioner is paid a salary by the State. Burns Ind. Stat. 4-5716, 4-5717. According to the indictment, it was his holding of the office of county pauper attorney which enabled petitioner to exact money from his victims (see Pet. App. 8).

The cases cited by petitioner for the proposition that a public defender does not act under color of law (Pet. 7-10) are distinguishable from the present case. In those cases—all of which are civil—plaintiffs were complaining that their attorney did not adequately represent them. That is very different from an allegation that the attorney used a state salaried office to exact money illegally from a client. The present case, we submit, is an instance of "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law * * *."

3. Petitioner also contends (Pet. 11) that the indictment does not allege a deprivation of property without due process of law. The court of appeals rejected this contention as an unduly narrow interpretation of the "deprivation" requirement of Section 242 (Pet. App. 8).

Petitioner first suggests that there could have been no deprivation because there was never any legal obligation on the part of the victims to pay the sums demanded (Pet. 11, 12). But it is immaterial that the victim may have been able successfully to defend a suit by petitioner for payment of the sum demanded. *United States* v. *Barr*, 295 F. Supp. 889 (S.D. N.Y.); cf. *Culp* v. *United States*, 131 F. 2d 93 (C.A. 8). As the court of appeals said, "a 'deprivation' does not have to be authorized by state law" (Pet. App. 8); *United States* v. *Wiseman*, 445 F. 2d 792 (C.A. 2), certiorari denied, 404 U.S. 967; *Catlette* v. *United States*, 132 F. 2d 902 (C.A. 4). All that is required is that the deprivation of property

be in violation of due process of law requirements, as is alleged in the present indictment. Cf. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337.

Here, impoverished persons were confronted with illegal demands from a public defender for additional funds if they wanted adequate legal representation. When faced with such demands, "a choice between adequate representation possibly followed by an acquittal and inadequate representation which could reasonably assure a conviction, the choice is surely of the Hobson variety" (Pet. App. 8). To say, as petitioner does, that "[t]he persons who allegedly paid money to the petitioner were under no compulsion to do so" (Pet. 16) ignores reality.

Petitioner also argues that none of the persons named in the indictment could have been deprived of property without due process of law because the county attorney could have recovered from them whatever they paid petitioner by way of attorney's fees (on the ground that his clients, by making the payments, indicated that they were not truly indigent and therefore not entitled to his free services). Burns Ind. Stat. 4-5716. But, even assuming the right of the county attorney, it obviously does not follow that *petitioner's* action afforded the victims due process of law. Cf. *Fuentes* v. *Shevin*, 407 U.S. 67; *Sniadach* v. *Family Finance Corp.*, *supra*.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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